

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 20th day of July 2018.

CASE NO. 18-1077-COAL-SC-GI

ORCHARD COAL COMPANY

Proceeding that requires coal receiver to show cause why the Commission should not enforce outstanding Notices of Violation in circuit court and assess costs.

COMMISSION ORDER

The Commission opens this proceeding to require a receiver of coal that utilizes the coal resource transportation system in the State of West Virginia to show cause why the Commission should not enforce outstanding Notices of Violation in circuit court and assess the receiver with costs.

BACKGROUND

The Commission has conducted a review of the period from July 2015 to June 30, 2018, of its Orders and records with respect to Orchard Coal Company (Orchard) and Commission administration and enforcement of Chapter 17C, Article 17A of the W. Va. Code, titled Regulation of the Commercial Transportation of Coal (CRTS Statutes). Following notice and opportunity for hearing, in the past three years, and beginning in July 2017, the Commission has issued four final Orders concluding that Orchard, a receiver of coal, committed violations of the CRTS Statutes. Pursuant to the Commission's statutory duties under W. Va. Code §§17C-17A-3(b) and 17C-17A-6, the following final orders imposed administrative sanctions on Orchard for its failure to report the receipt of coal shipments:

Case No. 17-5075-COAL-NOV final July 3, 2017

Case No. 18-5051-COAL-NOV final April 27, 2018

Case No. 18-5065-COAL-NOV final May 3, 2018

Case No. 18-5123-COAL-NOV final June 25, 2018

Commission records reflect that Orchard did not appeal the final Orders and has failed to remit penalties as ordered. As of the date of this Order, \$35,000 is delinquent for the penalties that Orchard has been ordered to pay by the Commission.

DISCUSSION

This order refers to coal resource transportation roads, the CRTS Statutes and the Commission Rules for the Transportation of Coal by Commercial Motor Vehicle, 150 C.S.R. 27 (Coal Rules) collectively, as the coal resource transportation system (CRTS). A background discussion of the application of the CRTS Statutes and Coal Rules appears in Appendix A.

The purpose of the CRTS is to address the economic needs of the state coal industry within the confines of the ability of the transportation infrastructure to accommodate these needs and in careful consideration for road safety and maintenance requirements of vehicles hauling coal. W. Va. Code §17C-17A-1(b). The law requires compliance by shippers, vehicle operators, vehicles owners and receivers as those entities are defined in W. Va. Code §17C-17A-2; Coal Rule 2.1 et seq.

Commission Jurisdiction

The West Virginia Legislature delegated to the Commission the administration and enforcement of the CRTS. W. Va. Code §17C-17A-3(b). The same statute required the Commission to issue rules, and the Commission promulgated its Coal Rules in 2004. The Commission has authority to enforce its CRTS Orders pursuant to W. Va. Code §17C-17A-3(b) and the section of Chapter 24 granting the Commission authority to compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in circuit court. W. Va. Code §24-2-2.

Show Cause

Commission final Orders reflect that Orchard has failed to comply with CRTS receiver reporting requirements. Our records further reflect that Orchard has failed to comply with or appeal the CRTS final Orders of the Commission. It is, therefore, appropriate to order Orchard to show cause why the Commission should not enforce the penalties imposed by its final orders in circuit court and assess costs pursuant to W. Va. Code §§17C-17A-6, 17C-17A-9 and Coal Rule 5.8.d.

Conclusion

The Commission will name Orchard a respondent to this proceeding and require it to make a verified response to this Order within twenty days to show cause why the Commission should not (1) proceed with enforcement of its final Orders and (2) assess Orchard with costs or fees as set forth in Coal Rule 5.8.d and W. Va. Code §§17C-17A-6, 17C-17A-9.

If during this investigation, additional violations of the CRTS Statutes and Coal Rules are uncovered, such as failure to report or accurately report coal shipments on the CRTS roads, shipments in excess of lawful weights, or delinquent tonnage fees, the Commission may investigate, take evidence and resolve those additional violations in this proceeding, including the imposition of additional penalties, costs and fees, if applicable.

This Order will also set a date for completion of discovery, a Staff report due date and a hearing date.

FINDINGS OF FACT

1. Orchard has failed to comply with CRTS reporting requirements for receivers of coal shipments, did not appeal Commission final Notice of Violation Orders, and has failed to pay the penalties ordered.

2. The total owed by Orchard pursuant to final Notice of Violation Orders for failure to report the receipt of coal shipments is \$35,000.

CONCLUSIONS OF LAW

1. The West Virginia Legislature delegated administration and enforcement of the CRTS to this Commission. W. Va. Code §17C-17A-3(b).

2. The Commission has enforcement authority to compel obedience to its Orders in circuit court pursuant to W. Va. Code §§17C-17A-3(b) and 24-2-2.

3. Violations of the CRTS may result in assessment of costs or fees as set forth in Coal Rule 5.8.d. of \$150 for each initial proceeding and \$300 for an appeal involving an Administrative Law Judge. W. Va. Code §17C-17A-9; Coal Rule 5.8.d.

4. The Commission should initiate this proceeding, name Orchard a respondent, and require it to make a verified response to this Order within twenty days to show cause why the Commission should not (1) proceed with enforcement of its final Orders in circuit court, and (2) assess Orchard with costs as set forth in Coal Rule 5.8.d.

ORDER

IT IS THEREFORE ORDERED that Orchard Coal Company is named respondent to this proceeding.

IT IS FURTHER ORDERED that on or before Thursday, August 9, 2018, Orchard Coal Company file a verified response to this Order and show cause why the Commission

should not (1) proceed with enforcement of its final Orders in circuit court, and (2) assess Orchard Coal Company with costs or fees as set forth in Coal Rule 5.8.d.

IT IS FURTHER ORDERED that Orchard Coal Company retain and make available for inspection by Commission Staff all paper and electronic records relating to receipt of coal shipments on and after July 1, 2015, and refrain from destroying any CRTS records during the pendency of this proceeding.

IT IS FURTHER ORDERED that the parties complete discovery in this matter on or before Thursday, September 13, 2018.

IT IS FURTHER ORDERED that Staff file its report in this matter on or before Friday, October 5, 2018.

IT IS FURTHER ORDERED that a hearing in this show cause and investigation proceeding will be held at 1:00 p.m. on October 16, 2018, at the Commission offices, 201 Brooks Street, Charleston, West Virginia.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, by United States certified mail – return receipt requested – on Orchard Coal Company, and by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste.



Ingrid Ferrell
Executive Secretary

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Appendix A

Application of CRTS Statutes and Rules

A vehicle transporting coal over coal resource transportation roads may operate in excess of the maximum gross weight limit prescribed in W. Va. Code §17C-17-9 for a specific vehicle by annually providing information to the Commission to demonstrate that the vehicle, as configured, has a total combined axel rating capacity equal to or greater than the maximum amount of weight for which a special permit is sought and paying a special permit fee. W. Va. Code §17C-17A-5; Coal Rule 3.1 et seq. Both shippers and receivers of coal are required to report to the Commission the gross weight of every coal shipment by commercial motor vehicle over a coal resource transportation road by 4:00 p.m. of the next business day after a shipment occurs. Coal Rules 4.2 and 4.6; W. Va. Code §17C-17A-6. A failure to timely or accurately report makes shippers and receivers subject to an administrative penalty of up to \$100 per shipment. Coal Rule 4.11. The CRTS Statutes and Commission rules also provide that a shipper that loads a permitted amount of coal that exceeds 88,000 pounds in the prior month must remit to the Commission by the tenth day of each month a payment of five cents per ton applied to the total tonnage of coal involved in each such shipment. W. Va. Code §17C-17A-3(b)(5); Coal Rule 3.18.

The Commission collects permit fees and tonnage fees on behalf of the West Virginia Division of Highways (WVDOH) and deposits those amounts into the Coal Resource Transportation Road Fund (Road Fund). The WVDOH uses monies in the Road Fund to construct, maintain and repair public highways and bridges over which substantial quantities of coal are transported. W. Va. Code §§17C-17A-3(b)(5) & 17C-17A-5(m); Coal Rule 3.20

W. Va. Code §17C-17A-9(c)(1) and Coal Rule 6.1 provide that every shipper of coal for transport on the public roads or highways of the state that holds a special permit from the Commission and loads coal in an amount that results in gross vehicle weight in excess of the special permit's lawful weight limit shall be subject to an administrative penalty per pound in excess of the lawful weight pursuant to the penalty schedule in W. Va. Code §17C-17A-10. The lawful vehicle weights are statutory and appear in W. Va. Code §§17C-17-9, 17C-17-9a and 17C-17A-5.

Penalties collected for a shipper's or receiver's failure to report or for exceeding lawful weights authorized by the special permits are paid to and retained by the Commission to fund its CRTS reporting and monitoring program. Coal Rules 3.20, 4.12 & 6.6.

Entities subject to the CRTS must retain records required by the Coal Rules for three years. Coal Rule 11.2.

Under W. Va. Code §17C-17A-9(f)(4) and Coal Rule 5.8.d, if the Commission finds a violation of the CRTS, it may assess a violator with costs of \$150 for each initial proceeding and \$300 for an appeal involving an Administrative Law Judge.

Under W. Va. Code §17C-17A-10(e), a shipper that directs or knowingly permits a vehicle to be loaded in excess of permitted weight is guilty of a misdemeanor and, upon conviction, shall be punished by a fine as set forth in W. Va. Code §17C-17A-10(a).